

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Provision of Directory Listing Information)	CC Docket No. 99-273
under the Communications Act of 1934, as)	
Amended)	
)	
To: the Commission)	

**PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE,
RECONSIDERATION OF INFONXX, INC.**

In its recent *Directory Listings Reconsideration Order (Order)*,¹ the Commission correctly rejected proposals that would have allowed incumbent local exchange carriers (ILECs) to impose unnecessary and discriminatory burdens on competing directory assistance (DA) providers. In justifying its decision, the Commission reaffirmed the general principle that competing providers should have “access to DA equal to that which LECs provide to themselves.”² As the *Order* notes, however, the Commission has not applied this nondiscrimination principle to all types of nonlisted and nonpublished subscriber information (collectively “nonpublished subscriber information”). Specifically, ILECs may continue denying access to nonpublished numbers that they regularly provide to their own DA operators.³ As a result, ILECs today, and in the future, can offer emergency services that competing providers cannot provide — solely because of the competitors’ lack of access to this information.

¹ Order on Reconsideration, *Provision of Directory Listing Information under the Communications Act of 1934, as Amended*, CC Docket No. 99-273, FCC 05-93, ¶ 1 (rel. May 3, 2005) (*Directory Listings Reconsideration Order*).

² *Id.* ¶ 2.

³ *Id.* ¶ 11.

InfoNXX, Inc. (InfoNXX) is concerned that this discriminatory access to nonpublished subscriber information will undermine competition in the wholesale DA market and is inconsistent with Section 251(b)(3) of the Communications Act and Commission policy. Accordingly, InfoNXX hereby requests the Commission to clarify that this exception to the general rule of nondiscriminatory access is a narrow one. Specifically, we ask the Commission to clarify that certain emergency contact services constitute the only acceptable use of the nonpublished numbers that LECs deny to competing providers but make available to their own DA operators. Furthermore, the Commission should clarify that if a LEC seeks to use this information for any other reason, the LEC must obtain a change in the Commission's rules and make available the nonpublished subscriber information to competing DA providers.

I. BACKGROUND

On January 23, 2001, the Commission released the *Directory Listings Order*,⁴ which took several positive steps toward promoting competition in the wholesale DA market. Among these steps was the Commission's conclusion that LECs must provide "competing [DA] providers . . . with nondiscriminatory access to the LECs' local directory assistance databases."⁵ It reasoned that such access was necessary "to allow all market participants to compete by creating a level playing field."⁶

On March 23, 2001, BellSouth Corporation and SBC Communications, Inc. (BellSouth/SBC) filed a petition for clarification or, in the alternative,

⁴ First Report and Order, *Provision of Directory Listing Information under the Communications Act of 1934, as Amended*, CC Docket No. 99-273, FCC 01-27 (rel. Jan. 23, 2001) (*2001 Order*).

⁵ *Id.* ¶ 1.

⁶ *Id.* ¶ 10.

reconsideration of the *Directory Listings Order*.⁷ The petition sought permission for ILECs to impose restrictions upon the uses of the DA information that they made available to competing providers, in part to protect “the privacy of their subscribers.”⁸ It also sought the right to restrict access to certain types of nonpublished subscriber information.⁹

On May 5, 2005, the Commission rejected the BellSouth/SBC petition. The Commission concluded that “‘nondiscriminatory access’ means that providing LECs must offer access equal to that which they provide themselves.”¹⁰ In rejecting BellSouth/SBC’s concerns about privacy, the Commission opined that any privacy concerns were adequately addressed by the Commission’s prior order requiring LECs to provide access to nonpublished *names* and *addresses*, but to restrict access to nonpublished *numbers*.¹¹ Although the Commission considered emergency contact with customers to be important, it concluded that competitive DA providers were not precluded from providing such contact because they could enter into interconnection arrangements under which the LEC would make the actual contact with the unlisted customer.¹²

InfoNXX understands the Commission’s desire to protect customer privacy — a goal we share — but we are concerned that this decision could undermine the competitive neutrality envisioned in the statutory requirement of *nondiscriminatory*

⁷ BellSouth and SBC Petition for Clarification or, in the Alternative, Reconsideration, CC Docket No. 99-273 (Mar. 23, 2001) (*BellSouth/SBC Petition*).

⁸ *Id.* at 6.

⁹ *Id.* at 7-8.

¹⁰ *Directory Listings Reconsideration Order* ¶ 8.

¹¹ *Id.* ¶ 11.

¹² *Id.* ¶ 11 n.45.

access to directory listing information. Accordingly, InfoNXX submits this Petition to urge the Commission to clarify that the differential treatment described in the *Order* is narrow — that is, LECs may only restrict access to nonpublished numbers where LEC DA operators have access to such numbers solely to provide emergency contact services *and* the emergency services are made available to competitive DA providers on reasonable and nondiscriminatory terms. The Commission should further clarify that if a LEC seeks to use nonpublished numbers in any other service offering, the LEC must first obtain an amendment to the rules (or a waiver) and must agree to make the nonpublished numbers available to competing DA providers.

II. THE COMMISSION SHOULD CLARIFY THAT THE EXCEPTION TO THE PRINCIPLE OF NONDISCRIMINATORY ACCESS IS NARROW

A. Nondiscriminatory Access is Necessary to Promote Competitive Neutrality and to Give Effect to Section 251(b)(3) and Commission Policy

Section 251(b)(3) establishes the principle that LECs should provide competing providers with non-discriminatory access to the same information that they make available to their own DA operators.¹³ In the statute, Congress expressly required LECs “to permit all [competing] providers [of telephone exchange service and telephone toll service] to have nondiscriminatory access to . . . directory assistance, and directory listing.”¹⁴ The plain language of the statute does not contemplate selective access and disclosure. As the Commission itself has noted, “section 251(b)(3) requires LECs to provide competing providers with access to DA *equal to* that which the LECs provide to themselves, and that LECs treat all such competitors equally.”¹⁵

¹³ 47 U.S.C. 251(b)(3).

¹⁴ *Id.*

¹⁵ *Directory Listings Reconsideration Order* ¶ 2 (emphasis added).

The Commission has consistently read the statute broadly to prevent LECs from giving their own DA services a competitive advantage by limiting the amount of DA information disclosed to competing providers. For instance, the Commission relied on the broad language of Section 251(b)(3) to reject the argument that LECs could impose contractual restrictions upon the uses of DA information by competing providers.¹⁶ The Commission explained that “section 251(b)(3)’s requirement of nondiscriminatory access . . . does not contemplate continuing veto power by the providing LEC over the uses to which DA information is put.”¹⁷

This broad interpretation is consistent with the statutory purpose and policy goals of section 251(b)(3), which include promoting competitive wholesale DA as one element of the larger competitive telecommunications market. As the Commission has recognized, “[t]he directory assistance market will not be fully competitive as long as incumbent LECs have the ability to leverage their monopoly control of their DA databases into market dominance.”¹⁸ Requiring nondiscriminatory access to all of the DA information that LECs make available to their own DA operators is essential to enabling competition in the wholesale market to flourish.

The statute and its underlying policy are in tension with the Commission’s decision to allow LECs to withhold nonpublished subscriber information that they make available to their own DA operators. Moreover, the fear that DA providers will be placed at a competitive disadvantage as a result of a discriminatory restriction on access to nonpublished numbers is not hypothetical or speculative. As various state tariffs confirm,

¹⁶ *Id.* ¶¶ 1, 3.

¹⁷ *Id.* ¶ 3 (quoting *2001 Order* at ¶ 28).

¹⁸ *2001 Order* ¶ 3.

ILECs today use this information to provide various emergency services.¹⁹ ILECs can therefore offer and provide services in a manner not available to competing providers because the Commission has limited competitors' access to nonpublished numbers. At the very least, the Commission should mitigate the anti-competitive effects of this decision by making clear that the exception is as narrow as possible.

This clarification is necessary to ensure that the Commission's decision with respect to nonpublished numbers does not become a potentially expansive and harmful precedent that allows LECs to restrict access to information that is then used to differentiate LEC DA services from competitive offerings. Accordingly, the Commission should make explicit that the only permissible LEC use of nonpublished numbers that are withheld from competitive DA providers is for emergency services that are themselves made available to competing providers on reasonable and nondiscriminatory terms. The Commission should require that any LEC attempting to provide additional services using nonpublished numbers must obtain Commission approval for such use and must provide the nonpublished numbers to competing DA providers.

¹⁹ For example, Qwest's local exchange tariffs for Arizona and Wyoming state that "[n]onpublished information may be released to emergency service providers, [and certain carriers and customers for billing purposes]. Nonpublished names and/or telephone numbers may also be delivered to customers on a call-by-call basis." See Qwest Corporation, Arizona Exchange and Network Services Price Cap Tariff, § 5.7.1.E.1.b (Eff. Aug. 29, 2001); Qwest Corporation, Wyoming Exchange and Network Services Catalog, § 5.7.1.E.1.b (Eff. Sept. 19, 2000). The Verizon New York tariff provides that "in claims of emergencies involving life and death," Verizon "will call the non-published number and request permission to make an immediate connection to the calling party. If the connection is refused, the calling party will be advised and an offer made to connect the calling party to the Police. The Company may also, in other emergency cases, call the non-published number and request a call-back to the calling party. The Company will advise the calling party if the non-published number cannot be reached, or if a request for a call-back to the calling party is refused." See Verizon New York Inc., PSC NY No. 1—COMMUNICATIONS, LISTINGS § A.6.b(1) (Eff. Jan. 23, 2003). For copies of these tariffs, see *Ex Parte* Letter from Gerard J. Waldron, Counsel to InfoNXX, to Marlene Dortch, Secretary, FCC, CC Docket No. 99-273 (Apr. 28, 2004).

B. Competing Providers Will Respect Customer Privacy

In justifying its decision to allow LECs to withhold nonpublished numbers from competitive providers, the Commission cited privacy concerns, explaining that it was attempting to strike a balance between “ensuring nondiscriminatory access” and “protecting customer privacy.”²⁰ Without accepting this rationale, InfoNXX stresses that it is particularly inapplicable to a situation in which a LEC attempts to use the withheld nonpublished subscriber information to provide expanded services beyond the emergency contact services contemplated in the *Order*. Allowing such an expansion of services would cause additional harm to competitive DA providers. Such a result would undermine the assumptions of the Commission’s balancing analysis.

Finally, the privacy concerns cited by the Commission lack a factual predicate and reflect implicit discrimination against competitive DA providers. There is simply no reason to believe – and no evidence in the record to support the position – that competitive providers would be any less mindful of customer privacy than LECs. In addition to potential legal and regulatory penalties, competitive providers have market incentives not to violate customer privacy. Any competitive provider who is not mindful of such privacy would have a more difficult time marketing its services to wholesale customers. Accordingly, the Commission would be justified in granting competitive DA providers access to nonpublished numbers in the future in the event that LECs seek to expand their use of such information.

To the extent any privacy concerns were to remain, they could be addressed through contractual provisions requiring a non-LEC DA provider to abide by


²⁰ *Id.*

customer-requested privacy restrictions concerning the nonpublished subscriber information, provided that (1) the contracting LEC gives the DA provider all the information about such customers that the LEC makes available to its own DA operators, and (2) the LEC is subject to the same privacy restrictions in its own use of the customer's DA information. Those practices would be reasonable and non-discriminatory. However, the Commission should not countenance any contractual requirements that unduly burden competing providers.

CONCLUSION

To ensure and advance an equal opportunity to compete across all aspects of the DA market, the Commission should clarify that nonpublished subscriber information withheld from competing providers may be used only for emergency contact services as contemplated in the *Order*. The Commission should further clarify that LECs must obtain an amendment to the rules or a waiver if they seek to expand upon the narrow exception to the general principle that competing providers must have access to the same DA information that LECs make available to their own DA operators.

Respectfully submitted,



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